IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1471 OF 2004

1. The Tata Power Company Limited,]
a company incorporated under the Indian]
Companies Act, VII of 1913 which has its]
Registered Office at Bombay House,]
Homi Mody Street, Mumbai 400 001]

2. Bomi J. Shroff]
of Mumbai, Indian Inhabitant, residing at]
22-A Akash Ganga, 89 Bhulabhai Desai Road,]
Mumbai 400 026] ..Petitioners

VERSUS

1. Reliance Energy Limited]
(*formerly* BSES Ltd.),]
a company registered under the provisions of]
the Companies Act, 1956 which has its]
Registered Office at Nagin Mahal (6th Floor),]
82, Veer Nariman Road, Mumbai 400 020]

2. The Maharashtra State Electricity Board,]
a statutory Board which has its office at]
Ali Yavar Jung Road, Prakash Gadh,]
Bandra (East), Mumbai 400 051]

3. The State of Maharashtra]
through the Ministry of Industry, Energy and]
Labour, which has its offices at Mantralaya,]
Mumbai]

4. The Maharashtra Electricity]
Regulatory Commission,]
constituted under the Electricity Regulatory]
Commissions Act, 1998 which has its office at]
13th Floor, Centre No. 1, World Trade Centre,]
Cuffe Parade, Colaba, Mumbai 400 005]

5. Mumbai Grahak Panchayat,]
having its office at Grahak Bhavan,]
Sant Dnyaneshwar Marg, Behind Cooper]
Hospital, Vile Parle (West), Mumbai 400 056]

6. Prayas,]
4, Om Krishna Kunj Society, Ganagote Path,]
Opp. Kamla Nehru Park, Erandavane,]
Pune 411 006.]

7. Thane-Belapur Industries Association,]
Plot No. P-14, MIDC, Rebale Village,]
Post Ghansoli, Navi Mumbai 400 071]

8. Vidarbha Industries Association,]
1st Floor, Udyog Bhavan, Civil Lines,]
Nagpur 440 001]

9. The National Textile Corporation]
(Maharashtra North) Limited,]
a Government of India Undertaking, having its]
office at N.T.C. House, 15 N.M. Marg,]
Ballard Estate, Mumbai 400 001]

10. The National Textile Corporation]
(South Maharashtra) Limited,]
a Government of India Undertaking, having its]
office at Apollo House, 382, N.M. Joshi Marg,]
Chinchpokli, Mumbai 400 011]

11.Brihan Mumbai Mahanagar Palika,]
a body corporate constituted under the]
Mumbai Municipal Corporation Act, 1888]
through its General Manager, Brihanmumbai]
Electric Supply and Transport Undertaking]
having its office at BEST Bhavan, Colaba,]
Mumbai 400 005]

12.The Chief Engineer (Electrical),]
Western Railways,]
5th Floor, Churchgate Station Building,]
Churchgate, Mumbai 400 020]

13.The Chief Electrical Engineer,]
Central Railways,]
Head Quarters Office, New Parcel Office]
Building, C.S.T., Mumbai 400 001]

14.The Mill Owners' Association,]
Mumbai,]
having its office at Elphinstone Building,]
10 Veer Nariman Road,]
Mumbai 400 001]

15.Bombay Small Scale]
Industries Association,]
having its office at Madhu Compound, 2nd Floor,]
Sonawala Cross Road No.2, Goregaon (E),]
Mumbai 400063]

16.The Central Electricity Authority,]
a body constituted by the Union of India under]
Section 3 of the Electricity (Supply) Act, 1948]
and continued under the Electricity Act, 2003]
and having its office at 212, Sewa Bhawan,]
R.K. Puram, New Delhi 110006]

17.R.K. Jain]
of New Delhi, Indian Inhabitant,]
Member and Ex-officio Additional Secretary]
to Government of India, Central Electricity]
Authority, having his office at 212, Sewa]
Bhawan, R.K. Puram, New Delhi 110006]..
Respondents.

Mr. Iqbal Chagla, Senior Advocate, and Mr. Janak Dwarkadas, Senior Advocate, with Mr. D.J. Khambatta and Ms. Ekta Jhaveri instructed by M/s. Doijode, Phatarphekar & Associates

for the petitioners

Mr. R.A. Dada, Senior Advocate, with Mr. J.J. Bhatt and

Ms. Anjali Chandurkar instructed by M/s. Mulla & Mulla & Craigie Blunt & Caroe for respondent No. 1

Mr. Shyam Diwan instructed by M/s. Little & Co.

for respondent No. 2

Mr. K.R. Belosey, Assistant Government Pleader,

for Respondent No.3

Mr. M.I. Sethna, Senior Advocate, with Mr. H.V. Mehta and

Mr. D.A. Dubey for respondent Nos. 16 & 17.

CORAM: DALVEER BHANDARI, C.J., &

DR. D.Y. CHANDRACHUD, J.

DATE: DECEMEBR 24, 2004

JUDGMENT (Per Dalveer Bhandari, C.J.):-

1. This petition is directed against the order dated 31st May, 2004 passed by the Maharashtra Electricity Regulatory Commission (for short, 'MERC').

2. The brief facts, which are necessary to dispose of the petition, are recapitulated as under:-

The Tata Power Company Limited (for short, 'TPC') has entered into an agreement with Maharashtra State Electricity Board (MSEB) on 12th March, 1985, as a result of which, it has been

providing standby facility to TPC. Since 1990, TPC is getting standby facility of 550 MVA (Mega Volt Ampere) from MSEB.

3. Reliance Energy limited (REL) also required standby facility of 275 MVA, and on the direction MSEB, it was agreed that TPC would provide standby facility of 275 MVA to REL out of 550 MVA received by TPC from MSEB. It was further agreed that REL would pay Rs.3.5 crores per month to TPC for providing 275 MVA standby facility to REL. It was agreed that TPC would pay MSEB Rs. 24.75 crores per month for the entire standby facility, *i.e.*, 550 MVA. The said amount was calculated on the basis of the tariff existed at that time and agreement to that effect was entered into between TPC and REL on 31st January, 1998; and inter-connection between the two systems was established on 14th February, 1998.

4. On 31st August, 1998, MSEB served notice on TPC, intimating its intention to enhance the charges for the standby facility from Rs.24.75 crores per month to Rs.30.25 crores per month with

effect from 1st December, 1998. TPC, in turn, gave notice dated 30th September, 1998 to REL of its intention to enhance the charges for the standby facility of 275 MVA provided by it from Rs.3.5 crores per month to Rs. 15.125 crores per month with

effect from 1st December, 1998. It may be pertinent to mention that it was for the first time that TPC demanded 50% of the charges for the standby facility of 275 MVA to REL of the total charges by REL for 550 MVA, meaning thereby that before this, TPC never asked REL to pay 50% of the amount paid by it to MSEB.

5. The short controversy, which arises for determination by this Court, is regarding the quantum of standby charges payable by REL to TPC for 275 MVA standby facility provided by TPC to REL from its quota of 550 MVA received from MSEB.

6. The dispute between REL and TPC arose after said notice of 30th September, 1998 was issued to REL by TPC. The Deputy

Chief Minister of the State advised the parties to settle the matter and directed REL to pay Rs. 9 crores to TPC and TPC to pay Rs.22 crores to MSEB.

7. The Government of Maharashtra constituted a committee under the provisions of the Electricity Regulatory Commissions Act, 1998 ("the Act", for short) to resolve such disputes.

8. It may be pertinent to mention that the Government passed an order on 22nd March, 2000, by which both REL and TPC were ordered to share the standby charges 50% each.

9. REL filed Case No. 7 of 2000 to the said Commission. The Commission, after hearing the parties, suggested a formula for computing the standby charges. In short, the decision of the Commission was that the standby charges ought to be calculated by the ratio of its maximum demand to the total maximum demand multiplied by the total standby charges. On the said formula, the Commission has mathematically worked out the charges and passed final order on 7th December, 2001,

directing REL to pay Rs.77.06 crores and TPC to pay balance of Rs.363 crores.

10. Aggrieved by this order of the Commission, both TPC and REL preferred appeals, being MERC Appeal Nos. 1 and 2 of 2002, respectively, before the High Court. The High Court, while setting aside the order of the Commission, directed the Commission for *de novo* consideration of the matter, because the Chairman of the Commission did not participate in the proceedings, and according to Regulation 21 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999, the Chairman and the other two members have to jointly participate in the proceedings. Whilst passing the order, the High Court also passed interim order of payment of charges.

11. TPC preferred Civil Appeal Nos. 8362 and 8363 of 2003 arising out of Special Leave Petition (Civil) Nos. 11461 and 11462 of 2003 before the Supreme Court. The Supreme Court,

while considering the submissions, noted that according to TPC, the standby charge is not an issue of tariff, but is a dispute relating to sharing or apportionment of the charges being paid by TPC to MSEB for providing the standby facility.

12.The stand of REL has been that the dispute between the parties was relating to determination of tariff, which fell within the exclusive jurisdiction of the Commission under Section 22 of the Act. The Commission alone had a right and jurisdiction to decide the dispute, and after the Commission came into existence, the State Government could not have passed the order dated 22nd March, 2000. Consequently, the said order was set aside.

13.Section 22 of the Act reads as under:-

"Functions of the State Commission--

(1)Subject to the provisions of Chapter III, the State Commission shall discharge the

following functions, namely:-

(a) to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in section 29;

(b) to determine the tariff payable for the use of the transmission facilities in the manner provided in section 29;

(c) to regulate power purchase and procurement process of the transmission utilities and distribution utilities including the price at which the power shall be procured from the generating companies, generating stations or from other sources for transmission, sale, distribution and supply in the State;

(d) to promote competition, efficiency

and economy in the activities of the electricity industry to achieve the objects and purpose of this Act.

(2)Subject to the provisions of Chapter III and without prejudice to the provisions of sub-section (1), the State Government may, by notification in the Official Gazette, confer any of the following functions upon the State Commission, namely:-

(a) to regulate the investment approval for generation, transmission, distribution and supply of electricity to the entities operating within the State;

(b) to aid and advise the State Government in matters concerning electricity generation, transmission, distribution and supply in the State;

(c) to regulate the operation of the power system within the State;

(d) to issue licences for transmission, bulk supply, distribution or supply of electricity and determine the conditions to be included in the licences;

(e) to regulate the working of the licensees and other persons authorised or permitted to engage in the electricity industry in the State and to promote the working in an efficient, economical and equitable manner;

(f) to require licensees to formulate perspective plans and schemes in co-ordination with others for the promotion of generation, transmission, distribution, supply and utilisation of electricity, quality of service and to

devise proper power purchase and procurement process;

(g) to set standards for the electricity industry in the State including standards relating to quality, continuity and reliability of service;

(h) to promote competitiveness and make avenues for participation of private sector in the electricity industry in the State, and also to ensure a fair deal to the customers;

(i) to lay down and enforce safety standards;

(j) to aid and advise the State Government in the formulation of the State power policy;

(k) to collect and record information concerning the generation,

transmission, distribution and utilisation of electricity;

(l) to collect and publish data and forecasts on the demand for, and use of, electricity in the State and to require the licensees to collect and publish such data;

(m) to regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State including the conditions governing entry into, and exit from, the electricity industry in such manner as to safeguard the public interest;

(n) to adjudicate upon the disputes and differences between the licensees and utilities and to refer the matter for

arbitration;

(o) to co-ordinate with environmental regulatory agencies and to evolve policies and procedures for appropriate environmental regulation of the electricity sector and utilities in the State; and

(p) to aid and advise the State Government on any other matter referred to the State Commission by such Government;

(3)The State Commission shall exercise its functions in conformity with the national power plan.”

14.The only other relevant section, which deals with determination of tariff of electricity is Section 29. The section reads as under:-

"Determination of tariff by State Commission--

(1)Notwithstanding anything contained in any other law, the tariff for intra-State transmission of electricity and the tariff for supply of electricity, grid, wholesale, bulk or retail, as the case may be, in a State (hereinafter referred to as the tariff), shall be subject to the provisions of this Act and the tariff shall be determined by the State Commission of that State in accordance with the provisions of this Act.

Provided that in States or Union territories where Joint Electricity Regulatory Commission has been constituted, such Joint Electricity Regulatory Commission shall determine different tariff for each other participating States or Union territories.

(2)The State Commission shall determine by regulations the terms and conditions for the fixation to tariff, and in doing so, shall be guided by the following, namely;--

(a) the principles and their applications provided in sections 46, 57 and 57A of the Electricity (Supply) Act, 1948 (54 of 1948) and the Sixth Schedule thereto;

(b) in the case of the Board or its successor entities, the principles under section 59 of the Electricity (Supply) Act, 1948 (54 of 1948);

(c) that the tariff progressively reflect the cost of supply of electricity at an adequate and improving level of efficiency;

(d) the factors which would encourage

efficiency, economical use of the resources, good performance, optimum investments, and other matters which the State Commission considers appropriate for the purpose of this Act;

(e) the interests of the consumers are safeguarded and at the same time, the consumers pay for the use of electricity in a reasonable manner based on the average cost of supply of energy;

(f) the electricity generation, transmission, distribution and supply are conducted on commercial principles;

(g) national power plans formulated by the Central Government;

(3) The State Commission, while determining the tariff under this Act, shall not show undue preference to any consumer of electricity, but

may differentiate according to the consumer's load factor, power factor, total consumption of energy during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4)The holder of each licence and other persons including the Board or its successor body authorised to transmit, sell, distribute or supply electricity wholesale, bulk or retail, in the State shall observe the methodologies and procedures specified by the State Commission from time to time in calculating the expected revenue from charges which he is permitted to recover and in determining tariffs to collect those revenues.

(5)If the State Government requires the grant of any subsidy to any consumer or class of

consumers in the tariff determined by the State Commission under this section, the State Government shall pay the amount to compensate the person affected by the grant of subsidy in the manner the State Commission may direct, as a condition for the licensee or any other person concerned to implement the subsidy provided for by the State Government.

(6) Notwithstanding anything contained in Sections 57A and 57B of the Electricity (Supply) Act, 1948 (54 of 1948) no rating committee shall be constituted after the date of commencement of this Act and the Commission shall secure that the licensees comply with the provisions of their licence regarding the charges for the sale of electricity both wholesale and retail and for connections and use of their assets or systems in

accordance with the provisions of this Act."

15. The Supreme Court in paragraph 21 of its order had stated that TPC and MSEB always treated the charges for standby facility as a matter relating to tariff. TPC gave notice to the State and MSEB on 30th July, 1996 for revision of tariff. In the correspondence exchanged amongst TPC, MSEB and REL, the charges for standby facility are described as a matter relating to tariff.

16. Mr. Iqbal Chagla, learned Senior Advocate, appearing for TPC, submitted that the order dated 31st May, 2004 was in excess of jurisdiction, without the authority of law and clearly transgressed the conditions of remand to MERC. According to Mr.Chagla, the remand to MERC was not unconditional. It was circumscribed by observations made by this Court and by the Apex Court.

17. Mr. Chagla submitted that the impugned order was contrary to

and in violation of the terms and conditions of the remand order.

18.Mr. Chagla further submitted that the impugned order was vitiated by Wednesbury principle of unreasonableness, *mala fide* in law and perverse. According to him, MERC ignored relevant considerations, whilst relying on irrelevant considerations. He also submitted that MERC abdicated its duty and decided the entire case based on a report by an expert committee of CEA. According to Mr.Chagla, the concept and definition of standby and standby charges was not an issue before MERC in the remand proceedings. Similarly, the fact that Reliance was entitled to standby facility up to 275 MVA from TPC, and TPC was entitled to standby facility of 550 MVA from MSEB was not an issue before MERC: The issue before MERC was what Reliance should pay, by way of standby charges, to TPC. According to Mr.Chagla, observations and findings of this Court were not *prima facie*. All these observations were, in fact, binding upon the MERC in the remand proceedings.

19. The Commission had referred the matter to the Central Electricity Authority, which is a statutory, technical authority. It has stated that the standby support is necessary when system demand exceeds the capacity available in the system, as the standby support is more relevant at peaking load requirements.

20. CEA' sstatement that Rs.24.75 crores of standby charges are built into the tariff and that hence, only the incremental standby charges should be shared, presupposes that there has been no change in TPC's expenses and that TPC has earned its due reasonable return.

21. Section 29 of the Electricity Regulatory Commission Act gives exclusive jurisdiction to the Commission to determine tariffs in the State of Maharashtra. The Commission is mandated under Section 22(1)(a) of the Act to determine the tariff for electricity, wholesale, bulk, grid or retail, as the case may be, in the manner provided in Section 29.

22. Mr.Chagla submitted that MERC, by accepting the CEA Report, sought to re-define the concept and nature of standby and standby charges, in direct negation of the binding observations of this Court and the Supreme Court.

23. Mr. Chagla contended that the standby facility is required as an insurance against any type of system failure, including failure of transmission / distribution system, is completely erroneous. Standby, it is well settled, is a facility of back up provided to a generator of electricity and not a distributor or transmitter of electricity. The standby facility may be utilized by a utility engaged in both generation and distribution. This will, however, always be by reason of tripping or stoppage of its generator. He further submitted that remand was confined to determination of charges payable for standby already defined by MERC in its previous order dated 7th December, 2001 and re-affirmed by the Supreme Court in the impugned judgment.

24.Mr. Chagla attacked the finding that the amount of standby is based on the largest single contingency of the system as contrary to law. He also attacked the finding of MERC that the requirement of the standby capacity has to be computed on the

basis of peak demand, and not on the basis of the largest sized unit of each utility under the present conditions as contrary to law, contrary to admitted facts and transgressed the terms of the remand. He submitted that the issue before MERC was what should be paid by REL to TPC for the standby facility provided by it. Notwithstanding this, MERC purported to make a reference to the CEA in the teeth of the order of the Supreme Court and far beyond the parameters of the remand. Mr. Chagla pointed out that MERC framed terms of reference for the CEA, beyond the scope of the dispute between the parties, which were contrary to the judgment and order of the Supreme Court as well as this Court. He submitted that it was not open for the MERC to invite the advice of the CEA under Section 73

(n) of the Electricity Act, 2003 on the requirement of standby facility to be availed by TPC and REL as on 31st January, 1998. According to him, this was really not an issue and unnecessarily MERC extended the terms of reference. Similarly, the definition and/or technical significance of standby facility in view of the needs of Metropolis of Mumbai was also not an issue to be determined by CEA.

25. Mr. Chagla also submitted that MERC, without applying its mind, has accepted the CEA Report in toto. As a matter of fact, MERC has abdicated its responsibility and decided the entire issue on the basis of the report received from CEA. According to him, MERC has not evolved or applied any principle on the basis of which the standby charges payable by REL to TPC could be determined. He referred to the Agreement dated 29th June, 1992 according to which standby capacity to REL may be provided from the standby capacity reserved by TPC with MSEB and appropriate charges for

sharing be worked out. He submitted that the standby facility enjoyed by REL from TPC was similar to the standby facility enjoyed by TPC from MSEB. If REL enjoyed the same standby facility of half the quantum enjoyed by TPC, it would defy logic to hold that REL should pay anything less than half of what TPC paid to MSEB.

26. Mr. Chagla further contended that MERC ignored and failed to apply any of the principles laid down under Section 29 of the Act. Since standby charges have been held to be tariff by the Supreme Court, it was essential that in the absence of any of the factors that affected tariff fixation, MERC was bound to apply the same principles in determining that REL pay TPC at the same rate and on the same basis that TPC pays MSEB for the identical standby facility.

27. Mr. Chagla argued that MERC failed to appreciate the fact that by reason of the commencement of operation at Dahanu Generating Station, purchase of electricity by REL from TPC

had declined significantly from 1995 and TPC consequently had, in 2001, a surplus generating capacity of 317 MVA for meeting its own standby requirements, and found by MERC in its order dated 7th December, 2001 in this very dispute.

28.Mr. Chagla further urged that MERC ignored the finding of Dr.Pramod Deo Committee, in which it has been held that REL should pay to TPC half of what TPC paid to MSEB.

29.Mr. Chagla submitted that the question as to whether TPC and REL should be pooled into a single system for the purpose of determining standby requirements was also extraneous and irrelevant since the relevant consideration was the requirement of the generator and not the size of the entire Mumbai system.

30.Mr. Chagla contended that Basak Committee Report was submitted to this Court during the hearing, which was limited to temporarily fixing the standby charges of Rs.3.5 crores payable by REL to TPC for the year 1997-98, which was clearly only

pro-tem, and did not lay down any guidance as to how standby charges should be determined and fixed in future.

31. Mr. Chagla also argued that MERC has based its decision entirely on the report of the CEA and abdicated its obligation to decide the case objectively. Mr.Chagla also levelled allegation of bias. According to him, CEA has been rendering services to REL and acting in close association with REL; and it could not have objectively and dispassionately advised MERC. He also submitted that Shri R.K. Jain was Chairman of Expert Committee appointed by CEA and he was also closely associated with REL and had gone abroad, along with officials of REL.

32. Mr. Rafiq Dada, appearing for respondent No.1 REL, stated that the petitioners have not complied with the Tariff Order, which came into operation on 1st June, 2004. This itself is a ground to dismiss this petition. The amount of standby charges to be paid to TPC by REL has been factored into the tariffs of

both TPC and REL. The order fixing the tariff for TPC has also provided for the repayment of Rs.322 crores directed to be refunded by TPC to REL under the impugned order. He submitted that REL has been a distributor of electricity since 1926, and until 1996, purchased its entire requirement of electricity from TPC. TPC generates electricity as well as purchases electricity from MSEB. He submitted that by Agreement dated 12th March, 1985 arrived at between TPC and MSEB, TPC agreed to pay a fixed sum per month to MSEB, which sum was defined as “Demand Charges”, and is now known as “Standby Charges”. Initially, the sum was calculated at 300 MVA for the year 1985 to be increased by 50 MVA each succeeding year. TPC and MSEB agreed that the said figure with the annual increase of 50 MVA, which had reached 550 MVA in 1990, should be frozen at 550 MVA. TPC was to pay to MSEB the fixed standby charge at the rate per KVA fixed by MSEB to be applied to figure equivalent to 550 MVA.

33.It was submitted that TPC increased its tariff on its customers, including REL, and as part of the tariff, TPC recovered standby charges paid by TPC to MSEB. REL purchased, and continues to purchase, approximately 35% of TPC's electricity generated and as part of payment for tariff, REL bore the burden of standby charges.

34.Mr. Dada submitted that with effect from October 1996, MSEB was recovering a sum of Rs.24.75 crores per month from TPC towards standby charges, pursuant to the agreement previously arrived at between TPC and MSEB. According to respondent No.1, TPC unreasonably demanded 50% of the charges extra from REL. REL refused to pay the said extra charges towards the standby charges as demanded. The Government of Maharashtra constituted an Expert Committee to determine the amount that would be paid by REL to TPC. According to the report of the Committee, REL was directed to pay additional amount of Rs.3.5 crores to TPC. It is further mentioned that TPC was recovering the entire amount of Rs.24.75 crores by

way of tariff from its customers, including 35% from REL.

35.It was submitted by learned counsel appearing for respondent No.1 that in August, 1998, MSEB gave notice to TPC to increase the monthly standby charges recoverable from TPC from Rs.24.75 crores per month to Rs.30.25 crores per month. Thereupon, TPC demanded a monthly sum of Rs.15.125 crores from REL, instead of the figure of Rs.3.5 crores per month. The amount of Rs.15.125 crores is half of Rs.30.25 crores, which MSEB directed TPC to pay. REL disputed the claim of TPC, and continued to pay only Rs.3.50 crores per month to TPC.

36.Mr. Dada submitted that TPC, on the other hand, unilaterally and surprisingly, without any objection from MSEB, started paying to MSEB a monthly reduced sum of Rs.15.125 crores from April, 1999, instead of Rs.24.75 crores.

37. TPC approached the Government of Maharashtra in January, 1999 to mediate in the issue. In March, 1999, Government determined that REL should pay an *ad hoc* additional amount of Rs.2.25 crores per month from December, 1998 to March, 1999 only and that the amount payable by REL to TPC for the year

1999-2000 and thereafter should be referred to a Committee which would look into the said issue, along with various other issues, which would also be referred to it and make its recommendations thereon. On 27th May, 1999, the Government constituted a Committee to consider the question of standby charges to be paid to TPC by REL from April, 1999 onwards.

38. According to respondent No.1, the impugned order of MERC is based on relevant and germane considerations and MERC has not re-written the concept of standby.

39. Mr. Dada also submitted that MERC has not abdicated its

responsibility and on the contrary, independently applied its mind to decide the case.

40. Mr. Dada submitted that the judgment of the High Court was, in effect, in the nature of an interim arrangement. He referred to the judgment of the Supreme Court in the matter of *Kunhayammed v. State of Kerala*, 2000 (6) SCC 359, and submitted that the judgment of this Court, in any event, merged in the judgment of the Supreme Court.

41. Mr. Dada submitted that recommendations of the Pramod Dev Committee were never acted upon and were always objected to by respondent No.1.

42. Mr. Dada also argued that REL's standby arrangement with TPC is totally independent of TPC's standby arrangement with MSEB. He submitted that the rate for standby charges payable by REL to TPC should be lower than the rate payable for standby charges by TPC to MSEB.

43.Mr. Dada vehemently contended that a basic fallacy in the submissions of the petitioners is that respondent No.1 should pay 50% to MSEB, because respondent No. 1 is enjoying facility of 275 MVA out of the 550 MVA of standby facility granted to the petitioners by MSEB. He submitted that respondent No.1 is already consumer to the extent of 35% of TPC's power supply to the City of Bombay. The balance power generated by TPC is purchased by TPC's customers. The total standby burden is distributed amongst the direct consumers of TPC, including REL. Thus, the standby burden is distributed over all the consumers. If the ratio of 50:50 is to be applied, as contended by TPC, then, the petitioners, TPC, would recover 50% from its customers, including respondent No.1, who would contribute 35% of the 50% through its tariff and in addition, would be required to pay 50% tariff fee as standard charges. Thus, respondent No.1, REL, would be burdened with approximately 67.5% of the standby charges payable by TPC to MSEB, causing an imbalance as TPC would

pay 50%, recover 50% from REL and retain with itself 17.5%.

44.Mr. Dada urged that CEA report is totally unbiased, as CEA is a statutorily constituted authority with eight full-time and six part-time members, experienced in various fields, such as technical, economic, commercial and financial. From time to time, it gives consultancy services to various generating companies. In the instant case, the Committee was constituted of four persons, who unanimously prepared the report, and it was placed before the entire body of CEA, which approved the said report.

45.It is not necessary to critically analyse and adjudicate the respective contentions of the parties for the reasons indicated in the succeeding paragraphs.

46.The real controversy involved in this case is regarding the quantum of standby charges payable by REL to TPC for 275 MVA standby facility. The matters of standby charges, tariff

and pricing are highly technical and complex matters where expertise of various fields, such as management, finance, economics, financial state of the State, cost of generation of power, distribution, pay-scale of the employees and many other factors have to be taken into consideration. These matters can be appropriately, justly and equitably decided by expert bodies.

47. It may be pertinent to mention that the electricity supply industry in India is presently governed by three Acts, viz., the Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and Electricity Regulatory Commissions Act, 1998. The Electricity Bill, which now has been passed by both the Houses of Parliament and received the assent of the President on 25th May, 2003, came on the Statute Book as "the Electricity Act, 2003". This Act seeks to replace the Indian Electricity Act, 1910, Electricity (Supply) Act, 1948 and Electricity Regulatory Commissions Act, 1998.

48. In the Electricity Act, 2003, there is a provision for Appellate

Tribunal for Electricity. Section 110 of the Electricity Act, 2003 reads as under:-

> **"Establishment of Appellate Tribunal.**--
>
> The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Electricity to hear appeals against the orders of the adjudicating officer or the Appropriate Commission under this Act."

49. According to Section 111 of the said Act, any person aggrieved by the order made by an adjudicating officer under this Act (except under Section 127) or an order made by the Appropriate Commission under this Act, may prefer an appeal to the Appellate Tribunal for Electricity. According to Section 111, an appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order by the adjudicating officer or the Appropriate Commission is received by the aggrieved person. In the instant case, since the Tribunal was not set up, therefore, the petitioners preferred a writ petition before this Court, in which directions were passed

from time to time. Since the Tribunal was not constituted, the petitioners obviously could not approach the Tribunal, and on constitution of the same, the petitioners may prefer appeal before the Tribunal. Though there is no question of delay in filing the appeal, however, if for any reason it is considered by the Tribunal that there is delay in filing the appeal, in our considered view, the same be condoned, and appeal be heard on merits.

50. In the succeeding paragraphs, we would try to demonstrate how the Court is not appropriately and justly equipped to determine the controversy involved in the case. If the Court is compelled to decide this case, it may decide the controversy on the basis of parameters demonstrated in the succeeding paragraphs, apart from the view already taken by the Commission in this case. In our considered view, none of the following parameters can justly, equitably, fairly and appropriately decide the controversy involved in this case because the Court has no mechanism to take into consideration

various other parameters and factors which are necessary for determination of the question:-

(i) One simplistic method of determining the controversy can be, whatever TPC is paying to MSEB for 550 MVA, REL be required to pay 50% of that because out of 550 MVA, TPC is providing 50% standby facility *i.e.* 275 MVA to REL.

(ii) Another method of deciding this controversy can be, whatever amount REL has been paying to TPC before demand for increase by MSEB (21st August, 1998) REL be required to pay increased amount to TPC in the same proportion.

(iii) Standby charges paid by TPC to MSEB are recovered from its customers. REL has been purchasing about 35% of TPC's electricity generated and as part of payment for tariff, REL bore the burden of standby charges. REL be required to pay 50% of the total charges minus the standby charges of 35%, which

REL is already paying to TPC as its consumer.

51. In our considered view, whichever method the Court may adopt out of the methods mentioned above, the Court would not be able to justly, equitably and fairly decide the controversy involved in the case in true sense.

52. In *Shri Sitaram Sugar Company Limited v. Union of India & Ors.,* (1990) 3 SCC 223, Their Lordships of the Supreme Court observed that price fixation is not within the province of the Courts. Judicial function in respect of such matters is exhausted when there is found to be a rational basis for the conclusions reached by the concerned authority. Judicial review is not concerned with matters of economic policy.

53. In a celebrated case in *Mississippi Valley Barge Line Company v. United States of America*, 292 US 282, 286-87: 78 L ed 1260, 1265, Justice Cardozo observed that the structure of a rate schedule calls in peculiar measure for the use of that

enlightened judgment which the Commission by training and experience is qualified to form.... It is not the province of a Court to absorb this function to itself.... The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body.

54. In *Federation of Railway Officers Association & Ors. v. Union of India,* (2003) 4 SCC 289, the Supreme Court observed that on matters affecting policy and requiring technical expertise, the Court would leave the matter for decision of those who are qualified to address the issues.

55. In *Association of Industrial Electricity Users v. State of A.P. & Ors.,* (2002) 3 SCC 711, the Supreme Court observed that fixation of electricity tariff or its revision and provision of cross-subsidy are policy matters outside the purview of judicial intervention unless it is shown to be illegal, arbitrary or *ultra vires* the Andhra Pradesh Electricity Reform Act, 1998.

56.In *Kerala State Electricity Board v. M/s. S.N. Govinda Prabhu & Bros & Ors.,* (1986) 4 SCC 198, the apex Court again reminded that price fixation is not the function of the Court and it is not within the Court's province to examine the price structure in minute detail if it is satisfied that the revision of tariff is not arbitrary and is not the result of the application of any wrong principle.

57.In *India Thermal Power Ltd. v. State of M.P. & Ors.,* AIR 2000 SC 1005, the Court again reiterated that it would not be proper for this Court to examine in details the various assumptions as they are technical matters and moreover, the techno-economic clearance was given by the CEA on the basis of such assumptions.

58.In *Union of India & Anr., v. Cynamide India Ltd. & Anr.,* AIR 1987 SC 1802, again, the well-known principles have been reiterated. Price-fixation is neither the function nor the forte of the Court. The Court is concerned neither with the policy nor

with the rates. But the Court has jurisdiction to enquire into the question, in appropriate proceedings, whether relevant considerations have gone in and irrelevant considerations kept out of the determination of the price.

59. Their Lordships of the Supreme Court, in a celebrated case, *West Bengal Electricity Regulatory Commission v. CESC Ltd.*, (2002) 8 SCC 715, again observed that the Commission constituted under Section 17 of the 1998 Act is an expert body and the determination of tariff, which has to be made by the Commission, involves a very highly technical procedure, requiring working knowledge of law, engineering, finance, commerce, economics and management. The Court, in the judgment, observed that it would be more appropriate and effective if a statutory appeal is provided to a similar expert body, so that various questions, which are factual and technical that arise in such an appeal, get appropriate consideration in the first appellate stage. The Court also observed that the Central Electricity Regulatory Commission, which has a judicial

member, as also a number of other members having varied qualifications, is better equipped to appreciate the technical and factual questions involved in the appeals arising from the orders of the Commission.

60. The apex Court, in *West Bengal* case mentioned above, further observed, without meaning any disrespect to the Judges, that neither the High Court, nor the Supreme Court, would in reality be appropriate appellate forums in dealing with this type of factual and technical matters. The Court also recommended that the appellate power against an order of the State Commission under the 1998 Act should be conferred either on the Central Electricity Regulatory Commission or on a similar body. Perhaps, in view of the observations of Their Lordships of the Supreme Court, the Union of India is contemplating to set up an Appellate Tribunal.

61. It has been the consistent view of the apex Court that the matter pertaining to pricing and tariff must be left to expert

bodies, because Courts have no mechanism or expertise to decide these matters. It is not possible to decide matters pertaining to Tariff or Standby Charges justly and appropriately by regular Courts. These issues must be determined by expert commissions or expert appellate tribunals.

62. It may be pertinent to mention that in Writ Petition No. 2577 of 2004 between the same parties, a similar question arose before the Court. It seems that in deference of the observation made by the apex Court in *West Bengal* (supra) and other cases, Union of India has decided to set up an Appellate Tribunal. The learned Additional Solicitor-General for India, Mr. B.A. Desai, on 18th October, 2004, made the statement before the Court that within a period of three months, the Appellate Tribunal shall become functional. Again, when the matter came up before the Court on 8th December, 2004, the learned Additional Solicitor-General made the statement that within a period of three months, *i.e.*, within three months from 18th October, 2004, the Appellate Tribunal shall become

functional.

63. The Appellate Tribunal is likely to become functional by 17th January, 2005. Since now, the Appellate Tribunal is going to become functional very shortly, in our considered view, the grievance of the petitioners should be decided by the Appellate Tribunal consisting of experts.

64. It is always desirable to decide any controversy promptly; but this is not one of those controversies where because of slight delay, there would be grave consequences. Ultimately, it is only the question of the amount of standby charges to be paid by REL to TPC and TPC to MSEB. During the interregnum period, we direct the parties to pay according to the interim order passed by this Court. Payments made by the parties, of course, would be without prejudice to the rights and contentions of the parties to be finally adjudicated by the expert Tribunal. Since there has been some delay because of the petitioners' approaching this Court, we request the Appellate

Tribunal to decide the case as expeditiously as possible, and in any event, within four months from the date of receipt of the judgment of this Court.

65. We have deliberately refrained from making any observation on the rival contentions of the parties. In our opinion, any observation may prejudice the case of the parties before the Appellate Forum. No further directions are necessary in this Writ Petition.

66. This Writ Petition is accordingly disposed of. In the facts and circumstances of the case, we direct the parties to bear their own costs.

CHIEF JUSTICE

DR.D.Y.CHANDRACHUD, J.